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IN THE

Supreme Court of the United States

No. 71-623

THOMAS KEE MING HSU,
Petitioner,

v.

GEORGE L. HART, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF COLUMBIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, Thomas Kee Ming Hsu, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding October 5, 1971.

OPINION BELOW

There is no opinion of the Court of Appeals other than as contained in its Order denying petitioner's petition for writ of mandamus, printed in the appendix hereto at page 1a.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254 and/or 28 U.S.C. 1651.

CONSTITUTIONAL PROVISION AND STATUTORY PROVISION INVOLVED

The pertinent part of the Constitutional provision is:

1. Amendment V

> "No person shall be. . . .deprived of life, liberty, or property without due process of law. . . ."

Statutory Provision Involved

United States Code, Title 28

§ 1404 (a)

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought".

QUESTION PRESENTED

Whether the United States District Court for the District of Columbia abused its discretion in issuing an Order to transfer an action brought in the District of Columbia by a federal prisoner challenging denial of parole to the district in which the prisoner is incarcerated and with which he has no contacts when there are significant contacts with the District of Columbia?

STATEMENT OF CASE

Petitioner was convicted on eleven counts of a twelve count indictment charging him with wire fraud, causing the interstate travel of a victim in execution of a fraudulent scheme, and causing the interstate transportation of money taken by fraud, in violation of 18 U.S.C. 1343 and 2314, and sentenced to a total of eight years in the federal penitentiary. He is confined at the Federal Prison Camp, Allenwood, Pennsylvania.

On November 2, 1970, petitioner became eligible for parole pursuant to the provisions of 18 U.S.C. 4202. In the proper time and form, petitioner applied for release on parole which was denied on November 13, 1970. On March 10, 1971, by counsel, in writing, petitioner requested the Board of Parole to reconsider its initial decision. That petition for reconsideration included a request that he be afforded an opportunity to provide evidence in refutation of any material in his file record which was the basis for the action of the agency in denying his application for parole. Said request also specifically asked that he be advised of the grounds for denying his application. On March 19, 1971, the Board advised petitioner through his attorney that it had received and carefully reviewed his request for reconsideration and that his file record "at this time does not indicate that any change is warranted in the Board's earlier decision of November 13, 1970. . . ". No other ground was stated and petitioner had not been afforded any hearing or opportunity to present evidence. On these points, the Board simply stated that it did not feel that a Washington Appellate Hearing was warranted at that time.

On April 5, 1971, petitioner brought suit in the United States District Court for the District of Columbia for declaratory judgment and mandatory order that he was entitled to a statement of the reasons for denial of the request for parole and to present evidence in refutation of any adverse evidence and that the Board's denial was arbitrary, capricious and unsubstantiated by substantial evidence and in violation of his right to a hearing. The Government moved for transfer of venue to the Middle District of Pennsylvania on May 26, 1971. That motion was granted over petitioner's opposi-

tion by order entered August 4, 1971, which also denied plaintiff's motion for a statement on immediate appeal pursuant to 28 U.S.C. 1291 (b).

REASONS FOR GRANTING THE WRIT

I

NO OTHER ADEQUATE REMEDY IS AVAILABLE

Petitioner asserts that the trial court abused its discretion and acted beyond its authority in ordering the transfer of this action. Transfer of venue is an interlocutory matter. *Wiren v. Laws*, 90 U.S. App. D.C. 105, 194 F. 2d 873 (1951); *Lemon v. Druffel*, 253 F. 2d 680 (6th Cir. 1958), cert. den. 358 U.S. 821; *Henry v. Briscoe*, 293 F. 2d 484 (2d Cir. 1958). And since the court below declined to include in its order a statement supporting immediate appeal, no effective review was possible except by way of extraordinary writ. Since the issue of transfer would be moot after decision on the merits, petitioner resorted to a petition for writ of mandamus in the United States Court of Appeals for the District of Columbia Circuit. See, e.g., *Lowe's Inc. v. McGuire*, 92 U.S. App. D.C. 319, 205 F. 2d 719 (1953); *Phillip Carey Manufacturing Co. v. Taylor*, 286 F. 2d 782 (6th Cir. 1961), cert. den. 366 U.S. 948.

This Court in *Norwood v. Kirkpatrick*, 349 U.S. 29 treated with a similar problem involving the interpretation of 28 U.S.C. 1404 (a), and an application for mandamus or prohibition to the District Judge by the United States Court of Appeals to set aside his order of transfer. This Court granted certiorari only for a very narrow purpose and petitioner respectfully submits that the considerations set forth in the dissent in that case justify a different result in this case.

II

TRANSFER ON THE AUTHORITY OF THE YOUNG DECISION DENIES PETITIONER EQUAL PROTECTION OF THE LAW AND ABRIDGES THE NINTH AMENDMENT RIGHT OF PLAINTIFF TO SELECT HIS FORUM

Petitioner is of oriental descent. He was born in China and is a naturalized citizen. The wrongs which led to his confinement were not acts of violence directed against the persons and property of another citizen such as the common law felonies of rape and robbery. Rather, Mr. Hsu was alleged to have violated statutory proscriptions by obtaining loans and advances from a number of persons of substantial means in order to obtain from a safety deposit box in Taiwan, Formosa, certain valuables belonging to Chiang Kai-Shek. Plain on the face of the matter is the fact that the persons who complained against Mr. Hsu themselves had a conspiratorial willingness to make a quick dollar. He was sentenced to eight years imprisonment.

Petitioner was a businessman with a family who operated a restaurant and had never been arrested or convicted of a crime. He has been a model prisoner and became eligible for parole on November 2, 1970, after serving 32 months of his sentence. Certainly this appears to be a clear cut situation where "there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws" and that "such release in not incompatible with the welfare of society", the statutory guidelines set out in 18 U.S.C. 4203 (a).

Yet, parole has been denied, and there has been an adamant refusal to state the reasons for the denial. Petitioner has brought suit to compel a statement of reasons and to secure the opportunity to rebut any evidence against him. Without being given the reasons, he can only wonder whether racial or political considerations account for denial of parole in circumstances where it appears fully warranted and within the contemplation of the statutory scheme to rehabilitate a prisoner by release on parole at the earliest practicable time.

Transfer of this action raises questions as to whether petitioner is receiving the constitutional promise of "equal justice under law" as engraved over the entrance way to the Supreme Court building. In all other classes of cases, once a plaintiff has exercised his basic right to select a forum, "The burden of establishing that a suit should be transferred is on the moving party. . ." *Ford Motor Co. v. Ryan,* 182 F. 2d 329 (2d Cir. 1950), cert. den. 340 U.S. 851. And, ". . .unless the balance is strongly in favor of the defendant, the plaintiff's forum should rarely be disturbed." *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508. However, under the decision in *Young v. Director, U.S. Bureau of Prisons,* 125 U.S. App. D.C. 105, 367 F. 2d 331 (1966) a federal prisoner who challenges action of the Board of Parole must bear the burden of demonstrating "extraordinary circumstances" and his choice of forum is almost automatically and invariably rejected. This class of plaintiffs alone is singled out to have its cases shuttled about the country to the districts where they are imprisoned. Typically, as in petitioner's case, this is far from any place where the plaintiff has family, friends or support.

Under the venue statute, 28 U.S.C. 1391, a plaintiff has a right to select his forum. This is a codification of the common law which recognized and protected the basic civil right of a suitor to choose his forum and reflects a basic constitutional right. That right is essential to rendering even-handed justice. Without it, a plaintiff as a practical matter may be denied the opportunity to correct a wrong because he cannot afford the expenses of litigating in another forum. And the effectiveness of his representation may well be adversely effected. For instance, if this case is transferred to the Middle District of Pennsylvania, it will be necessary for petitioner to employ local counsel. Communication and coordination between counsel and the relatives in the District of Columbia who are supporting this case and rendering vital assistance in gathering materials and filling in details will be very severely effected. Also, plaintiff may have difficulty in securing counsel experienced in federal administrative law to press this case, which turns in

large part on administrative procedure at this juncture. And local counsel will face his own practical difficulties since the Board of Parole records and officials involved are in Washington. Finally, if petitioner succeeds in obtaining an administrative hearing, that will be held in Washington.

These considerations simply highlight why a plaintiff's selection of a forum is a basic civil right, particularly in cases where a lone individual is proceeding against a federal agency, for which distance and expense are no impediment. Given its importance, and its traditional observance in all courts, this right must be deemed to rank among those encompassed by the Ninth Amendment which provides,

> "The ennumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The right to go to the court of one's choice to bring an action is closely analogous to the right to travel from state to state recognized in *United States v. Guest*, 338 U.S. 745 (1966) as a fundamental constitutional right. Each centers upon one's right to conduct his activities at the place of his choice within the nation and is therefore "fundamental to the concept of our Federal Union" at p. 757. Functionally, the right to select a forum where litigation is feasible and involves no undue and prohibitive expenses is so vital to the individual's securing justice that it must rank in importance with the right of privacy held protected by the Ninth Amendment in *Griswold v. Connecticut*, 381 U.S. 479 (1965), because, "Although the Constitution does not speak in so many words of the right. . .I cannot believe it offers these fundamental rights no protection." at p. 495 (concurring opinion, Goldberg, J.).

Moreover, regularly and almost automatically transferring actions by federal prisoners against the Board of Parole to the district of imprisonment far from any place where the prisoner has any voluntary, meaningful contacts can have but one effect—to severely discourage the bringing of such actions. In the case at bar, for example, the result is to

deny petitioner the right to counsel of his choice, the assistance of his family, the forum of his choice, and to impose an exceptional expense and hardship in asserting his right to litigate the important issues of his physical freedom and the right to rehabilitation on parole.

Since it cannot be doubted that effective access to the courts is a fundamental civil right, the inevitable effect of this transfer policy is "to needlessly chill the exercise of basic constitutional rights", thereby rendering that policy unconstitutional. *United States v. Jackson*, 390 U.S. 570, 582 (1968).

III

28 U.S.C. 1404 (a) DOES NOT AUTHORIZE TRANSFER ON THE FACTS OF THE INSTANT CASE

The Government moved for and was granted transfer of petitioner's action on the ground that petitioner is confined at the federal penitentiary at Allenwood, Pennsylvania, and that authority for such action is contained in 28 U.S.C. 1404 (a).

Petitioner respectfully urges that 28 U.S.C. 1404 (a) provides for a change of venue only "for the convenience of parties and witnesses in the interests of justice", and is discretionary only in that a district court "may transfer any civil action to any other district" if the statutory purpose may better be served.

As petitioner has pointed out herein above, this Court in *Norwood v. Kirkpatrick, supra.*, undertook a partial interpretation of 28 U.S.C. 1404 (a) but limited its opinion to the facts in that case and a holding that the statute to some extent broadened the common law doctrine of *forum non conviens*. It is clear from the language of section 1404 (a) that Congress did not invest the district courts with an unfettered discretion to transfer cases, but limited that discretion to the stated purposes of serving the convenience of the parties involved.

Transfer under the instant circumstances does not serve those purposes. Petitioner was and is a resident of the State of New York, not Pennsylvania. His mother, sister, and brother-in-law, niece and her husband reside in the District of Columbia. They are the persons who have retained his counsel. His counsel is located in the District of Columbia. The United States Board of Parole is located in the District of Columbia. The records and officials who perform the administrative work of said Board are located in the District of Columbia as is the Department of Justice of which said Board is a constituent agency. If petitioner succeeds in obtaining a hearing, it will be held in Washington.

On the other hand, petitioner has no connection whatsoever with Allenwood, Pennsylvania except that he is involuntarily present in that geographic location on a temporary basis by reason of an *ex parte* decision of the United States Department of Justice. Thus, there are no significant contacts between petitioner or this lawsuit which could justify the conclusion that a change of venue would serve "the convenience of the parties and witnesses" or be "in the interest of justice", the statutory guidelines which alone can justify a court's exercising its discretion to transfer.

In short, a transfer in the instant case is clearly inconsistent with the plain language of section 1404 (a). The government cites the case of *Young v. Director, U.S. Bureau of Prisons, supra.*, as authority to justify its request. However, that decision involved two parole violators, whereas the records demonstrate that petitioner in this case has been a model prisoner and is *prima facie* eligible for parole.

Moreover, petitioner has a statutory right under 28 U.S.C. 1391 (e) to have venue laid in the District of Columbia. That section provides in pertinent part that:

> "A civil action in which each defendant is an officer. . .of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may. . . .be brought in any judicial district in which

> . . .a defendant in the action resides, or. . .the cause of action arose".

Furthermore, it is well-settled that "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed". *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508; and that this rule applies to the application of section 1404 (a). *Texas Gulf Sulphur Co. v. Ritter*, 371 F.2d 145 (10th Cir. 1967); *Fearless Corp. v. Teter*, 318 F.2d 822 (10th Cir. 1963); *Ford Motor Co. v. Ryan*, 182 F.2d 329, (2d Cir. 1950), cert. den. 340 U.S. 851. As the court in the *Fearless* decision stated in applying section 1404 (a), "The burden of establishing that a suit should be transferred is on the moving party and unless the balance is strongly in favor of a defendant, the plaintiff's choice of forum should rarely be disturbed".

No such showing was made by the Government which merely relied upon the *Young* decision as granting a blanket right to transfer absent a showing of extraordinary circumstances by petitioner. Indeed, it is clear that no showing of that nature is possible since the U.S. Board of Parole and its members are located in the District of Columbia, and petitioner's cause of action *ipso facto* arose in the District of Columbia within the meaning of the venue statute. Indeed, there is strong reason to believe that the cause could not have been brought in the district to which transfer is sought because the action did not arise there, nor does either the plaintiff or the defendant reside there as required by 28 U.S.C. 1391. The cause of action clearly arose in the District of Columbia where the Board of Parole is located and made its decision. And petitioner can hardly be deemed a resident of a location at which he was involuntarily deposited by the Federal Government for a temporary period away from the state of New York where he was a resident.[1]

[1]With respect fo 28 U.S.C. 1391 (a), "In the case of a natural person, residence means domicile." *Smith v. Murchison*, 310 F. Supp. 1079 (S.D.N.Y. 1970). And a serviceman's assignment to a duty station does not make him a resident of that place.

Petitioner calls the Court's attention to his contention that the question in ascertaining whether a transfer of venue is warranted is not the convenience of the court, the linchpin of the rationale in the *Young* decision where the Court stated that, "Transfer. . .will relieve the courts of this jurisdiction from the unnecessarily onerous task" of deciding cases brought by prisoners incarcerated far away from Washington on the basis of events alleged to have occurred in some other part of the country. Rather, as the wording of the statute clearly indicates, and as the Supreme Court has stated, "[V]enue is primarily a matter of convenience of litigants and witnesses". *Denver & R.G.W.R. Co. v. Brotherhood of R. Trainmen,* 387 U.S. 556, 560 (1967).

Consistent with the foregoing, there is specific authority that a court's own considerations do not justify transfer. In *Fannin v. Jones,* 229 F.2d 368 (6th Cir. 1956) the court stated, "A court should not under § 1404 (a) look to docket conditions in order to serve the court's own convenience." at p. 369. Judge Ryan of New York's Southern District in *Keller-Dorian Colorfilm Corporation v. Eastman Kodak Co.*, 88 F.Supp. 863 (S.D.N.Y. 1949) refused a motion to transfer stating, "Of course it would serve the convenience of the court and other litigants with pending causes to transfer the action to some other less burdened district. No district court may, however, order such a transfer only to serve its own convenience." at p. 866.

It is therefore, respectfully submitted that Congress has not authorized any district court to transfer a civil action on the basis of convenience to the Court, or of a possible impact on its workload or calendar or for any other reason such as that the litigation might be considered as "unnecessarily onerous task". Congress and the Supreme Court have made it perfectly clear that a change of venue is only justified when upon a careful balance of the individual considerations in a particular case it has been demon-

Johnson v. Zarefoss, 198 F. Supp. 548 (E.D. Pa. 1966), aff'd 305 F. 2d 825.

strated that the transfer of a civil action will be "for the convenience of parties and witnesses" and "in the interest of justice".

As shown herein above, there has not only been no attempt by the Government to demonstrate that in this case the convenience of the plaintiff or the U.S. Board of Parole or witnesses would be served, but there is no possibility of such a showing being made. This, for the reason that the Board of Parole, its general counsel, its officials, all the records in the case, plaintiff's counsel, many of petitioner's closest relatives are all located in the District of Columbia.

IV

THE HOLDING AND RATIONALE OF THE YOUNG DECISION DO NOT AUTHORIZE TRANSFER OF THIS ACTION

Aside from questions as to whether the *Young* decision comports with the requirements of 28 U.S.C. 1404 (a) and is constitutionally sound, that decision by its own terms does not warrant transfer of the case at bar. Here, the acts in question, the Board of Parole's refusal to state its reasons for denying parole or to grant a hearing, occurred in the District of Columbia, and are not "events alleged to have taken place in distant parts of the country". It is the procedure of the Board which is the heart of the matter. Not only did the action take place within the District of Columbia, but the case turns essentially on questions of procedure under federal administrative law, an area in which the District of Columbia federal courts have unparalleled expertise.

Retention of this action in the District of Columbia would not subvert the functional purposes of the *Young* decision. Petitioner's genuine and substantial contacts with the District of Columbia, the presence of his mother, sister, brother-in-law, niece and her husband, who have retained counsel set him apart from the typical federal prisoner. Cer-

tainly, this is not the ordinary case contemplated by the *Young* decision where there are no meaningful contacts between the prisoner and the District of Columbia. To deny transfer in this case would not open any floodgates that could overburden the courts, for those federal prisoners with such genuine and substantial contacts with the District of Columbia certainly constitute only a miniscule percentage of the federal prison population.

Therefore, it appears clear that there is no justification under the terms of the statute, or the decisions of the Supreme Court or the *Young* decision itself for transferring this cause of action.

CONCLUSION

Wherefore, the premises considered, petitioner respectfully urges the Court to grant review of the decision below on writ of certiorari.

Respectfully submitted,

Carl L. Shipley
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1643 September Term, 1971

Thomas Kee Ming HSU,
Petitioner

v.

George L. Hart,
United States District
Court Judge,
Respondent

Before: McGowan and Tamm,
Circuit Judges

ORDER

On consideration of petitioner's petition for writ of mandamus and of the answer filed with resepct thereto, it is

ORDERED by the Court that petitioner's petition for writ of mandamus is denied.

Per Curiam

ORDER

This matter having come before the Court on defendant's motion to change venue and for enlargement of time, and subsequently on plaintiff's motion for a statement pursuant to 28 U.S.C. 1292 (b), and the Court having considered the complaint and the memoranda for and against the motions, and it appearing to the Court that there are no extraordinary curcumstances present in this case warranting retention in this jurisdiction, so that the case should be transferred to the district of confinement under *Young v. Director, U.S. Bureau of Prisons,* 125 U.S. App. D.C. 105, 367 F. 2d 331 (1966), and it appearing further that this order does not involve a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal will not materially advance the ultimate termination of the litigation, it is by the Court, this 4th day of August, 1971,

ORDERED that this action be and it hereby is transferred to the United States District Court for the Middle District of Pennsylvania; and it is further

ORDERED that plaintiff's motion for a statement pursuant to 28 U.S.C. 1292 (b) be and it hereby is denied; and it is further

ORDERED that defendant's time to answer, move or otherwise plead be and it hereby is extended to and including September 30, 1971.

Presented by:

/s/
United States District Judge

/s/ N ATHAN DODELL
Assistant United States Attorney
Attorney for Defendant

No objection as to form:

/s/ JOHN BARRY DONOHUE, JR.,
by Nathan Dodell (with authority)
Attorney for Plaintiff